



October 20, 1999

Mr. Habib H. Erkan, Jr.
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR99-2961

Dear Mr. Erkan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128380.

The City of San Antonio (the "city") received two requests for information relating to a request for proposals regarding diesel exhaust filtration systems. You assert no exceptions in order to withhold the requested information. However, because third parties' proprietary interests are implicated, you request our decision whether the bid proposals may be released. We assume that you have released the remaining requested information to the requestors.

Because the property rights of third parties may be implicated by the release of the requested information, this office notified Ward Diesel Filter Systems, Inc. ("Ward Diesel") and AirCor Corporation ("AirCor") of the requests for information and of their opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Ward Diesel and AirCor responded by asserting that portions of their bid proposals are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial

information obtained from a person and privileged or confidential by statute or judicial decision.¹ Commercial or financial information is excepted from disclosure under the second prong of section 552.110.

Ward Diesel asserts that its test data and customer list are excepted from disclosure under the trade secret prong of 552.110. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*² This office has held that if a

¹The Seventy-sixth Legislature amended the commercial or financial prong of section 552.110 to provide that the information is excepted from public disclosure if there is a demonstration of "specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the October 19, 1999 Serv. 4500, 4503 (Vernon) (to be codified as an amendment to Gov't Code § 552.110). The amendment applies to a governmental body's request for an attorney general decision made on or after September 1, 1999, the effective date of the amendment. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 36, 1999 Tex. Sess. Law Serv. 4500, 4514 (Vernon).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its]

governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We have reviewed Ward Diesel's arguments and the submitted information and conclude that its customer list is excepted from public disclosure under the trade secret prong of section 552.110. However, we are unable to identify any test data in the submitted information. Thus, we have no basis to conclude that Ward Diesel's test data are excepted from public disclosure under section 552.110. See Open Records Decision No. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the city must release the test data to the requestor.

AirCor does not object to release of its "pricing or relevant information furnished on forms supplied by the City." Thus, the city must release such information. However, AirCor contends that the remainder of its proposal is excepted from disclosure under section 552.110. AirCor argues that it expected that its bid proposal would remain confidential based on the city's instructions to bidders, which state that "[v]endors must clearly indicate any portion of the submitted bid that the vendor claims is not subject to public inspection under the Open Information Act [sic]." A mere expectation of confidentiality by an individual supplying information does not properly invoke section 552.110. Open Records Decision No. 203 (1978) (construing predecessor to section 552.110); see also Open Records Decision No. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential). Additionally, a governmental body's promise to keep information confidential is not a basis for excepting information from required public disclosure under the Public Information Act unless the governmental body has specific authority to do so by statute. Open Records Decision Nos. 514 (1988), 479 (1987), 444 (1986). Because AirCor has not shown the applicability of section 552.110, the city must release AirCor's bid information that is responsive to the request.³ Open Records Decision No. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

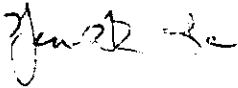
competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

³The city need only release information in existence at the time the city received the requests for information. Open Records Decision No. 530 (1989) (requestor's right of access to information construed as of time request is made).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 128380

Encl. Submitted documents

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